IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

MEDRANO V. MEDRANO

ROBERT S. MEDRANO, APPELLANT,
V.
SHAWN K. MEDRANO, APPELLEE.

Filed June 12, 2012. No. A-11-808.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Affirmed in part, and in part reversed and remanded with directions.

James Walter Crampton for appellant.

Thomas R. Hickey for appellee.

INBODY, Chief Judge, and IRWIN and SIEVERS, Judges.

SIEVERS, Judge.

Robert S. Medrano appeals from the order of the district court for Douglas County entered August 30, 2011, that decided the motion to modify the decree that he filed and the cross-motion for relief filed by his former wife, Shawn K. Medrano. For the reasons explained below, we affirm in part and in part reverse the judgment and remand the cause to the trial court with directions.

PROCEDURAL BACKGROND

On November 19, 2007, the district court entered its decree of dissolution of marriage. At the time of the dissolution, the parties had two minor children. The trial court ordered that commencing October 1, 2007, Robert pay child support in the amount of $936.77 per month for two children, and then $624.93 per month for one child. The court specifically recited that in calculating child support, it had considered income from all sources for Robert, including his employment at Girls and Boys Town and his cleaning business, as well as the 4 hours per week he worked at a community college for $13 per hour. While the trial court set forth an extensive schedule for parenting time, such is not pertinent to this appeal. The court found that neither

party should pay alimony and that Robert's 401K plan at Girls and Boys Town should be divided equally between the parties via an approved qualified domestic relations order. Robert was ordered to pay $1,250 toward Shawn's attorney fees and costs. Provision was made for division of approximately $15,000 in net equity in the parties' marital residence.

Robert was ordered to maintain health and medical insurance on the children while they were minors. All nonreimbursed reasonable and necessary health care costs for the children in excess of $480 per year were to be paid 50 percent by each of the parties. The court set forth specific provisions for submission of such expenses by Shawn, the custodial parent, and payment thereof directly to her.

The instant proceeding began on June 16, 2010, when Robert filed an application to modify child support, asserting that a material change in circumstances had occurred with respect to his earnings and that payment of the ordered amount left him with income less than the federal poverty level. In Shawn's cross-application in response to the motion, she asserted that Robert has "fully and continually failed and refused" to pay support and the children's expenses; that his arrearages were in excess of $11,000; and that Robert should contribute to the attorney fees she would incur in this proceeding.

The application for modification and cross-application were tried May 25, 2011, and the district court rendered its decision on August 30. The court summarized Robert's testimony that he lost his job at Girls and Boys Town in June 2009, a position he had held for 20 years. The court made note of Robert's testimony that he is a severe diabetic, that his illness requires a regular schedule in his activities, and that his income has dropped significantly from the approximately $38,000 per year he was earning at the time of the dissolution.

The trial court also recited that Shawn became unemployed in March 2011 when she was terminated from Girls and Boys Town due to reorganization. The court further stated that Shawn receives $340 per week in unemployment and is looking for work. The trial court's decision recited that Shawn had testified that Robert was delinquent in his child support in the amount of $11,604.28, but she claimed that he was delinquent even before he lost his job. Shawn also testified that Robert failed to pay the attorney fees ordered in the decree, failed to contribute his share of the medical expenses, and paid little on their student loans that are in excess of $71,000. Shawn also alleges that Robert's reduction in income was due to his misconduct, because his employment was terminated for sleeping at work. He testified that he was in the last 20 minutes of his midnight to 8:30 a.m. shift when he dozed off while looking at a newspaper. The district court did not find that this was a basis for denial of the modification sought by Robert, and Shawn has not cross-appealed that decision. Accordingly, we address it no further.

The trial court applied the "unclean hands" doctrine, citing the fact that Robert's income does not appear to have been reduced substantially since 2007 and that even while he was still employed at Girls and Boys Town, he was significantly in arrears in his child support. The court further found that Robert "spent significant funds at convenience stores and on entertainment and fast food, rather than pay his full amount of child support," citing to trial exhibits 4, 5, and 6. Accordingly, the court found that "at least some of the child support arrearages [are] willful and thus his modification is dismissed on the basis of unclean hands." The "willful portion" was not further delineated.

Shawn alleged that Robert had failed to comply with the Nebraska Child Support Guidelines (Guidelines), specifically Neb. Ct. R. § 4-204, in his effort to seek modification because he failed to provide the required 2 years of tax returns, financial statements, and current wage stubs prior to the hearing. She further alleged that he was claiming depreciation in the cleaning business and that therefore he had not provided the 5 years' required income tax returns 14 days before the hearing, as mandated by § 4-204. The court found that Robert did not "materially comply with § 4-204, and, as such, his application to modify his child support is dismissed."

With respect to the cross-application, the trial court found that Shawn had incurred medical expenses in the amount of $2,793.69 after deduction of her obligation for the first $480 per child and, accordingly, the trial court ordered Robert to pay Shawn one-half, or $1,396.84, for medical expenses. Shawn further sought reimbursement for the cost of maintaining health insurance on the children in the amount of $3,228.50 after Robert failed to do so as ordered by the dissolution decree. Thus, the court awarded judgment to Shawn from Robert in the amount of $3,228.50.

The court found that an award of attorney fees to Shawn was justified and awarded her attorney fees in the sum of $2,500 from Robert. Robert has timely perfected an appeal to this court. We will detail the additional pertinent evidence from the record in the course of our discussion of the assignments of error. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

ASSIGNMENTS OF ERROR

Robert asserts, restated, that the trial court erred and abused its discretion in finding that the unclean hands doctrine should be applied to him, in failing to find a change in circumstances, and thus in denying his application for modification of child support.

STANDARD OF REVIEW

Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court. *Wood v. Wood*, 266 Neb. 580, 667 N.W.2d 235 (2003).

ANALYSIS

Did Robert Prove Material Change in Circumstances?

The divorce decree entered in mid-November 2007 did not adopt and attach a child support worksheet. The trial court, in setting child support, recited that when calculating child support, it had included income from all sources for Robert, including his employment at Girls and Boys Town and his cleaning business, as well as considering the 4 hours per week he worked at the community college earning $13 per hour. However, the trial court did not make a factual finding as to Robert's monthly income on which its award of child support was based. Robert testified to his "understanding" that the court had used the sum of "$4,423.37" (we assume monthly income) as his income. Our record does not reveal where that figure comes from, the 2007 decree does not use it, and the evidence we next detail does not support that

testimony because it would mean that Robert was earning yearly income of $53,000--thus we do not credit this testimony.

In evidence in this proceeding is Robert's 2007 tax return showing that he had W-2 income from three jobs that totaled $37,120, against which he offset a Schedule C loss of $6,899 from his cleaning business, leaving him adjusted gross income for 2007 of $29,756. While the 2007 tax return could not have been completed at the time of trial in November 2007, as we have indicated above, the court considered the appropriate sources of income that Robert had at the time which are in turn reflected on his 2007 tax return that was in evidence in this modification trial.

As of the modification trial on May 25, 2011, Robert had lost his job at Girls and Boys Town in June 2009. That job represented $32,899 of his 2007 W-2 wages, which would equal a monthly gross wage of $2,742 from that position in 2007, when his child support obligation was established. Robert testified that he is now working full time for the community college and is presently paid $11.38 an hour for a 40-hour week, which when extrapolated produces a yearly income of $23,670, or gross pay of $1,972 per month. Additionally, he testified that his cleaning business consisted of "a couple of homes" that he cleans three times a month for which he is paid $9.75 an hour. He did not provide a figure for his monthly earnings from this "side job." It is unclear whether his testimony means there are two or three houses that he cleans three times each month or that between the two or three homes, he does about three cleaning jobs a month. Both his 2008 and 2009 tax returns show gross cleaning income of exactly $5,250 each year, striking us as strange that it would be exactly the same each year. However, on his 2008 and 2009 tax returns, the Schedule C's for the cleaning business show a loss to his cleaning business of $7,571 in 2008 and a loss of $7,580 in 2009--$9 short of being exactly the same each year. Although Shawn's brief asserts that Robert cannot properly deduct depreciation from income under the Guidelines to reduce his business and wage income, there is no depreciation claimed on the 2008 and 2009 Schedule C's. Rather, the net losses are generated by business expenses far exceeding gross receipts. Clearly, the Schedule C's for 2008 and 2009, if believed, show that Robert is running a "side business" that is grossly unprofitable. It is clear that deviations from the Guidelines are permissible whenever the application of the Guidelines in an individual case would be unjust or inappropriate. See *Crawford v. Crawford*, 263 Neb. 37, 638 N.W.2d 505 (2002). We conclude after our de novo review that including the "paper loss" from the cleaning business so as to reduce Robert's wages is unjust and inappropriate, and we decline to do so because it seems apparent that he is either intentionally (or artificially) reducing his reportable income or running a business that makes no sense. Thus, for the purpose of determining whether there has been a material change in circumstances, we believe the most appropriate income comparison is to compare Robert's 2007 W-2 earnings against his hourly earnings in 2011 when the modification trial occurred, without consideration of the house cleaning business.

Robert's W-2 earnings in 2007 were $37,120, or $3,093 per month, whereas his earnings at the community college in 2011 would be approximately $23,670, or gross pay of $1,972 per month. This reduction of roughly 33 percent between 2007 and 2011 is clearly sufficient to show a material change in circumstances.

However, the trial court did not make a finding on whether there had been a material change of circumstances, but, rather, it found that Robert had not complied with § 4-204 of the Guidelines, which states in part:

> Copies of at least 2 years' tax returns, financial statements, and current wage stubs should be furnished to the court and the other party to the action at least 3 days before any hearing requesting relief. Any party claiming an allowance of depreciation as a deduction from income shall furnish to the court and the other party copies of a minimum of 5 years' tax returns at least 14 days before any hearing pertaining to the allowance of the deduction.

The trial court found that "[Robert] did not materially comply with Section 4-204, and as such, his application to modify his child support is dismissed." At the time of the trial, May 25, 2011, his 2011 return could not have been prepared. As to his 2010 return, that is not in evidence. Robert testified that at the time he prepared his answers to interrogatories, the 2010 return was not yet prepared, but he had provided the 2009 return to his lawyer. Shawn argues that Robert failed to prove his 2010 income, as well as his earnings at the time of this hearing. Shawn's counsel objected to the question, "Are you still making today what you made in 2010?" The court overruled the objections, and Robert answered that his earnings in 2011 as compared to 2010 were "roughly about the same." Other than the above-quoted evidence, Shawn did not in any way dispute that Robert had lost his job at Girls and Boys Town in June 2009, that he was at the time of trial employed at the community college, or that his wage was other than the $11.38 per hour for a 40-hour week that he testified to. Using 52 paid weeks at that pay rate equals $1,972 per month. Robert said that his take-home pay before child support garnishment was $1,900 and that the garnishment is the exact amount of the monthly child support. We have found no case using a violation of § 4-204 as a ground for denying a motion for modification, and here it appears any violation was merely technical and nonprejudicial, and there is nothing in the record that suggests that Shawn took action to force compliance with any requests for documentary evidence. In the end, Robert's 2011 earnings are most relevant on the issue of whether there has been a material change in circumstance due to a reduction in income. The trial court made a specific finding that "[Robert's] income does not appear to have been reduced substantially since 2007." That conclusion is plainly contrary to the evidence when the evidence of his 2011 earnings is considered. Additionally, at the time of the filing of the modification application in June 2010, he was making only $11.38 per hour from the community college job. In 2007, Girls and Boys Town paid him a yearly income of $32,899, which based on a 40-hour week would equal $15.88 per hour. Thus, on an hourly calculation, his hourly pay rate has decreased by 28.33 percent from 2007 to 2011.

Therefore, we conclude that the trial court erred in dismissing the motion to modify because of a nonprejudicial and technical noncompliance with § 4-204 of the Guidelines. Second, we conclude that Robert proved that there had been a material change in circumstances with respect to his earnings as such had decreased substantially in 2010 and 2011, since the establishment of his child support obligation in the 2007 decree.

Does Unclean Hands Doctrine Prevent Modification of Child Support, Despite Proof of Material Change of Circumstances?

The district court, citing *Voichoskie v. Voichoskie*, 215 Neb. 775, 340 N.W.2d 442 (1983), found that Robert's application for modification must be dismissed, because the evidence showed that he had failed to pay child support while still employed at Girls and Boys Town, and that he "spent significant funds at convenience stores and on entertainment and fast food, rather than pay his full amount of child support." This appears to be a two-pronged rationale for denying relief that he otherwise is quite clearly entitled to. The unclean hands doctrine has its genesis in the notion that "[h]e who seeks equity must do equity" and that a party seeking equitable relief must come into court with "clean hands." *Id.* at 776, 340 N.W.2d at 443-44. The district court concluded that "[Robert's] failure to pay at least some of the child support arrearages is willful, and, thus, his modification is dismissed on the basis of unclean hands."

Exhibit 14, the Department of Health and Human Services "Payment History Report" (PHR) shows that as of May 25, 2011, the date of the modification trial, Robert was in arrears in the amount of $9,773.88, plus $1,353.85 in accrued interest. Exhibit 16 is composed of five canceled checks dating from November 22, 2006, to February 7, 2007, totaling $3,592, written on Robert's personal checking account payable to Shawn, which he testified were direct payments of temporary support, and the checks are all labeled in the "memo" blank as "child support." Robert testified that he tried to get Shawn to take the steps necessary to correct the official record so that he would get credit for these payments, but she never did that, and in this proceeding he sought credit--but the trial court never addressed this claim, although we assume it was implicitly denied.

Robert's testimony concerning these direct payments was not contested or rebutted, but the PHR that the trial court obviously worked off of does not credit him with these payments. This PHR is a cumulative accounting starting in November 2006 when temporary support was mandated--a year before the dissolution decree was entered. Finally, we note that the decree "preserve[s]" all ordered temporary support obligations. Accordingly, it is clear that Robert should receive credit against his arrearages for the payments reflected on exhibit 16 in the amount of $3,592. Thus, putting aside interest (the amount of which would not be accurate in any event because of such payments), Robert's child support arrearage, excluding any interest, at the time of the modification trial was $6,181.38. Thus, given his child support obligation of $936.77 per month beginning October 1, 2007, he is actually only approximately 6.6 months in arrears on the PHR, and as discussed later, such arrearage includes the full amount of support originally set without accounting for any retroactive modification that might be in order.

In determining whether to apply the "unclean hands" doctrine in order to deny Robert's requested modification, the trial court found, citing to exhibits 4, 5, and 6, that "even when [Robert] was still employed at [Girls and Boys] Town and when he was already in arrears in his child support obligation, [Robert] spent significant funds at convenience stores and on entertainment and fast food rather than pay his full child support." The court also found that he was "significantly behind" when still employed at Girls and Boys Town. The latter conclusion is incorrect. Robert was terminated in June 2009. Exhibit 14 shows that on June 1, 2009, his arrearage was $3,079 and interest of $402.75, but such arrearage and interest would be fully

covered by the direct payments that he made to Shawn for which he was not credited in the PHR or by the trial court, but for which we find he should have been given credit.

With respect to Robert's checking account statements for mid-March to mid-April 2009, and late May to late June 2008, Shawn's claim is that the exhibits cited by the trial court in its order denying modification, exhibits 4, 5, and 6, show wastage and dissipation of his funds for convenience stores, entertainment, and fast food when he should have been paying child support. While we decline to precisely dissect each entry on these statements, it is rather apparent, given the absence of charges to grocery stores and the frequency of fast food charges, that Robert was eating a lot of fast food rather than buying groceries. We cannot say that is wastage, at least of his earnings. And his entertainment appears to be two concerts, a baseball game, and some roller skating--hardly excessive by any measure. We find no charges to casinos, liquor stores, or travel which could be considered waste of his earnings. But, most important, the PHR shows that $936.77 in child support was paid April 21, 2008, and again on May 22. In 2009, child support of $936.77 was paid on February 25 and April 1, and $940 on May 1. Thus, the evidence shows that when Robert was allegedly improperly entertaining himself and eating fast food but not paying child support as claimed by Shawn, he actually paid full child support in all of the months covered by exhibits 4, 5, and 6. To the extent that the district court found that the unclean hands doctrine applied to prevent modification because of such expenditures when Robert was not paying support, that conclusion is clearly wrong.

In summary, after Robert is credited for substantial payments he made directly to Shawn and the exhibits are closely reviewed, all of the reasons the trial court used for denying modification on the basis of the unclean hands doctrine are, after our de novo review, lacking in evidentiary support. Thus, the district court abused its discretion in denying the application for modification.

CONCLUSION

Accordingly, we remand the cause to the district court with directions to grant Robert's application to modify child support and to calculate child support using the monthly earning rate of $1,972 per month. Robert's new child support obligation should be effective retroactive to July 1, 2010. See *Riggs v. Riggs*, 261 Neb. 344, 622 N.W.2d 861 (2001) (modification of child support order should be applied retroactively to first day of month following filing date of application for modification). The PHR shows that the amount of $937.77 per month was being paid from the time of the application to the time of trial, and, we assume, during the pendency of this appeal. Accordingly, the calculation of arrearages and interest will require adjustment to account for the retroactivity of Robert's new child support obligation, as well as the direct payments for which we have given Robert credit. Robert did not challenge the district court's award to Shawn of attorney fees, unpaid medical expenses, and reimbursement for health insurance payments, and thus such are affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.